Supreme Court, U.S.
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No. 99-146

IN THE

Supreme Court of the United States

PAMELA E. FERNSLER, *et al.*,

Petitioners,

v.

TWO MEN AND A TRUCK INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Two Men And A Truck International, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

This Petition asks the Court's review of a Sixth Circuit opinion affirming a jury verdict for trademark unfair competition and breach of contract decided in RESPONDENT's **TWO MEN AND A TRUCK®/** INTERNATIONAL, INC.'s ("RESPONDENT") favor. The Court of Appeals issued its opinion on December 17, 1998 and denied Petitioners' Motion for Rehearing on April 21, 1999. The Court of Appeals opinion is NOT RECOMMENDED FOR FULL-TEXT PUBLICATION per 6th Cir. R. 206 and 6th Cir. I.O.P. 206. In light of the criteria required for publication under the Sixth Circuit's Rule 206, one can reasonably conclude that the Court of Appeal's panel determined that this case:

(1) did not establish a new rule of law, or alter or modify an existing rule of law, or apply an established rule to a novel fact situation;

(2) did not create or resolve a conflict or authority either within the circuit or between this circuit and another;

(3) did not consider legal or factual issues of continuing public interest; and

(4) did not address a lower court or administrative agency decision that has been published of which this panel was aware.

No Court of Appeals panel is bound by the rulings in this case when deciding future cases, because it has not been recommended for publication. *See* 6th Cir. R. 206.

For reasons described below, there is no compelling reason for this Court to review the Court of Appeal's decision in this fact-bound case.

A. Flint's And Fernsler's Breaches Of Contract

RESPONDENT is a franchisor and operates a franchise system that provides moving and related services using its **TWO MEN AND A TRUCK®** service mark and business operating system throughout the United States. Presently there are approximately 70 **TWO MEN AND A TRUCK®** franchise locations.

A 1990 franchise agreement ("Contract") between RESPONDENT and Petitioner Michigan Moving Company, f/k/a Two Men and a Truck/Flint, Inc. ("FLINT") authorized FLINT to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark and business operating system to operate FLINT's moving business in Genesee County, Michigan. FLINT was one of RESPONDENT's best franchisees during its nearly 4 years in the **TWO MEN AND A TRUCK®** franchise system.

In February 1994, unbeknownst to RESPONDENT, Petitioner Pamela E. Fernsler ("FERNSLER"), President of FLINT, signed a Ryder Truck Dealer Agreement as "Two Men and a Truck" on behalf of FLINT. A May 1994 newspaper article stated that FLINT's "Two Men and a Truck is a new Ryder Truck Rental Dealer" and "Two Men and a Truck will rent Ryder trucks locally." When RESPONDENT learned of FLINT's plan to sell Ryder services from its **TWO MEN AND A TRUCK®** franchise location, RESPONDENT was upset and concerned because FLINT's operation of a Ryder rental truck business violated several provisions of

the Contract. RESPONDENT sent a letter to FERNSLER in May 1994 telling her that the operation of the Ryder rental truck business violated the Contract, Articles II(3) regarding Approved Services, III(4) regarding Manner of Using the Marks, and III(7) regarding Permitted Business Name. The letter required FLINT to stop operating the Ryder business from the FLINT'S **TWO MEN AND A TRUCK®** franchise location. Soon after receiving the letter, FERNSLER told RESPONDENT's President Melanie Bergeron that she [FERNSLER] didn't think that operating the Ryder rental truck business from her **TWO MEN AND A TRUCK®** franchise business was a big deal, but acknowledged that she should have gotten written authorization to do so.

RESPONDENT's growing system wanted to keep a good franchisee like FLINT in the system. Furthermore, RESPONDENT thought FLINT could test-market Ryder rental truck services for possible use throughout the entire **TWO MEN AND A TRUCK®** system. With this in mind, RESPONDENT suggested that FLINT could test-market the Ryder rental truck business, subject to the terms of a Contract addendum to be drawn to authorize the test-marketing. This was a satisfactory solution for all parties, and RESPONDENT sent a letter confirming this understanding to FLINT and FERNSLER. RESPONDENT's letter noted that once FLINT signed the addendum to test-market the Ryder concept, RESPONDENT would look forward to watching FLINT grow with the new concept. RESPONDENT sent a test-market addendum and cover letter to FERNSLER, asking her to sign it, or to call if FERNSLER had questions about it. Despite the letter, FERNSLER did not communicate with RESPONDENT, or return the signed addendum.

On September 2, 1994, RESPONDENT wrote to FERNSLER to inquire why she hadn't communicated with RESPONDENT or returned the signed addendum. FERNSLER did not respond. RESPONDENT's President called FERNSLER, but FERNSLER was not available and did not return the calls. Finally, sometime later in September 1994, RESPONDENT's President was able to reach FERNSLER via telephone. FERNSLER told RESPONDENT's President that her [FERNSLER's] attorney, unknown to RESPONDENT at that time, told her not to talk to RESPONDENT and not to sign anything.

On September 23, 1994, RESPONDENT's legal counsel, Steven M. Raymond ("Raymond"), sent a letter to FERNSLER informing her that: (1) FLINT was violating the Contract, Articles II(3), III(4) and III(7) because of FLINT's operation of the Ryder rental truck business; (2) FLINT could cure the violations by signing the test-market addendum sent to FERNSLER; and (3) if the matter wasn't amicably resolved within 7 days, then legal action would be taken to terminate FLINT's **TWO MEN AND A TRUCK®** franchise. Coincidentally, on the same day Raymond sent this letter to FERNSLER, FLINT's legal counsel, Don C. Huprich ("Huprich"), called and introduced himself to Raymond. He represented to Raymond that RESPONDENT committed disclosure violations when it sold the **TWO MEN AND A TRUCK®** franchise to FLINT some four years before. As a result of these alleged disclosure violations, Huprich said he intended to take action to get FLINT out of the **TWO MEN AND A TRUCK®** franchise system, but wanted to do so without litigating. He sought an agreement from Raymond to extend (toll) the 4-year statute of limitations on FLINT's alleged disclosure violation claim, since the 4-year statute ran out on September 26, 1994, three

days hence. Raymond would not agree to toll the statute of limitations because it was not in the best interest of his client, telling Huprich to take whatever action he thought necessary.

The following Monday, September 26, 1994, FLINT filed a Demand for Arbitration seeking a declaration that FLINT could cease operating as a **TWO MEN AND A TRUCK®** franchisee, while retaining the right to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark. It being apparent that FLINT had no intention of signing the Ryder test-market addendum, RESPONDENT sent FLINT a letter on September 26, 1994 of its intent to terminate FLINT if it did not cure its violation of operating an unauthorized Ryder rental business. A week later Raymond received a letter from Huprich, stating that FLINT intended to leave the **TWO MEN AND A TRUCK®** franchise system.

Incongruously, two days after Huprich's letter, Raymond received a letter from another attorney representing FLINT, Dale Mattis, which letter said that FLINT had written to Ryder and advised Ryder that FLINT would no longer operate a Ryder rental truck business. Contrary to Dale Mattis' representation in this letter, FERNSLER testified at trial that FLINT did not write to Ryder, but told it verbally of FLINT's intent to stop operating a Ryder rental truck business. Confused as to FLINT's intent [Attorney Huprich taking action to get FLINT out of the **TWO MEN AND A TRUCK®** system, and Attorney Mattis giving notice of FLINT's alleged intent to cure a violation to stay in the **TWO MEN AND A TRUCK®** system], RESPONDENT physically observed FLINT's franchise location on October 6, 1994 and discovered that FLINT was still displaying a Ryder sign. FLINT was also continuing to answer the phone

as a Ryder rental truck business. The same day, RESPONDENT's legal counsel, Raymond, wrote via facsimile to attorney Dale Mattis informing him that FLINT had failed to cure its violations. Mattis never responded. On the same day, Raymond also telephoned Huprich, and let him know of the Ryder situation. Huprich said he would inform FERNSLER, but he never followed up with Raymond on the issue.

On October 10, 1994, FLINT's franchise sales report and royalties and advertising fees were due for the month of September, but were never tendered. FERNSLER testified at trial that she knew FLINT was terminated as of October 10, 1994, and didn't provide any royalty reports or pay any more royalty or advertising fees to RESPONDENT on the advice of counsel. Even so, as FERNSLER admitted at trial, FLINT continued to use RESPONDENT's **TWO MEN AND A TRUCK®** service mark until a court order enjoined FLINT from using it in April, 1995.

RESPONDENT filed this action in November 1994. Several months later, RESPONDENT learned that FERNSLER had secretly incorporated a new corporation, Petitioner P.E.F., Inc. ("PEF"), for the sole purpose of operating the Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** franchise location. PEF was incorporated on October 5, 1994, the very day FLINT said it had stopped operating a Ryder rental truck business. Incredibly, FERNSLER testified at trial that she did not believe it "relevant" or "worth sharing" with RESPONDENT that she had incorporated PEF for the purpose of operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location, despite FERNSLER'S prior promise that FLINT would sign a Ryder test-market agreement to

test the concept within the **TWO MEN AND A TRUCK®** franchise system.

B. PEF's Liability For Unfair Competition

FERNSLER admitted that PEF's start-up was funded using proceeds generated from FLINT's business. She also admitted FLINT paid the rent for the entire business premises, including the area the PEF business allegedly occupied. Finally, the evidence showed that PEF, through actions of FERNSLER, answered its phone as "Two Men and a Truck." The evidence demonstrated that PEF was nothing more than a sham corporation. FERNSLER incorporated it to fraudulently run Ryder sales through it to avoid obligations under the Contract.[1] FERNSLER's secretive and fraudulent actions were especially egregious, because she had already admitted FLINT's contractual obligation to obtain written authorization before selling Ryder services from FLINT's **TWO MEN AND A TRUCK®** franchise location. PEF's liability for unfair competition arose as that of a joint tortfeasor, and as a party defendant who impeded RESPONDENT's calculation of actual damages.

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1. Despite Petitioners' claim at trial that PEF, not FLINT, was operating the Ryder rental truck business after October 6, 1994, Ryder was still sending checks to "Two Men and a Truck/Flint" in connection with Ryder services provided by Petitioners as late as February 1995.

REASONS FOR DENYING THE WRIT

I. PETITIONERS RECEIVED AMPLE NOTICE OF RAYMOND APPEARING AS A POTENTIAL WITNESS.

Petitioner filed a Motion in *Limine* on the eve of trial to, among other things, exclude RESPONDENT's legal counsel, Raymond, as a potential fact witness in the case, because he allegedly was not timely disclosed in interrogatory answers. In response, RESPONDENT noted that all deadlines regarding disclosure of witnesses, including Raymond, had been met per the District Court's scheduling orders. Furthermore, and more importantly, Petitioners had known for 1 1/2 years that Raymond was a potential fact witness[2].

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2. For 1 1/2 years Raymond told Huprich that Raymond could appear as a witness. These discussions arose in every instance because Huprich complained that Raymond could not appear as counsel and as a witness. Huprich knew Raymond signed an affidavit dated February 6, 1995 in support of RESPONDENT's Preliminary Injunction Motion. The affidavit related to Raymond's perception of communication with Huprich and Petitioner's other counsel, Dale Mattis. Both Raymond and Huprich submitted affidavits in connection with their Summary Judgment Motions in January and February 1996. On February 7, 1996, Huprich sent Raymond a letter saying that Raymond had to immediately withdraw his affidavits or withdraw as counsel of record and that if Huprich didn't hear from Raymond, Huprich would assume that Raymond planned to continue to be a witness and counsel of record. On March 8, 1996, Huprich sent Raymond another letter, noting that there had been no response to his [Huprich's] February 7, 1996 letter, and that Huprich would bring it to the court's attention at the Summary Judgment hearing. Huprich never brought it to the Court's attention on that day or at any time, until the eve of trial.

(See Appendix C, Exhibit I of the Petition) Finally, Petitioners never filed a motion or otherwise acted to obtain a court order to compel Raymond's testimony, even after Raymond was timely identified as a witness on the Witness List.

When an opposing party knows of witnesses and the scope of their relevant knowledge well before trial, the failure to disclose the witnesses in interrogatories, absent bad faith, is not a basis for excluding the witness' testimony. *Newman v. GHS Osteopathic*, 60 F.3d 153, 156 (3rd Cir. 1995). RESPONDENT did not act in bad faith. It consistently took the position for 1 1/2 years that Raymond could act as legal counsel and a fact witness testifying to certain matters, and timely included Raymond on its Witness List.

On the other hand, Petitioner's counsel's (Huprich's) dilatory tactics wreaked of bad faith. For a year Huprich had told Raymond he could not act as legal counsel and also be a witness, and warned Raymond that if Raymond did not change his position, Huprich would bring the matter to the District Court's attention. Despite this threat, Huprich took no action for more than a year. Finally, on the eve of trial, during the final pretrial conference, Huprich complained for the first time that if Raymond were allowed to testify, he [Huprich] would be required to withdraw as counsel for defendants. (See Appendix C, Exhibit I of the Petition) Thereafter, Huprich brought a Motion in *Limine* to exclude Raymond as a witness, claiming that if Raymond were allowed to testify, Petitioners would suffer unfair prejudice. In the Sixth Circuit, allegations of unfair prejudice are given less weight where the party's attorney engaged in dilatory conduct, as Huprich did here. *Freeland v. Amigo*, 103 F.3d 1271, 1278 (6th Cir. 1997). The District Court denied

Huprich's motion to exclude Raymond as a witness, but disqualified Raymond from continuing as RESPONDENT's legal counsel.

The Court of Appeals affirmed the Trial Court's ruling, stating in its opinion that RESPONDENT's failure to provide proper notice of its intent to call Raymond as a witness was "harmless," so Raymond was not prohibited from testifying under Fed. R. Civ. P. 37. *Two Men and a Truck/International, Inc. v. Fernsler*, 172 F.3d 49, 1998 WL 898864 (6th Cir. 1998).

In its Petition before this Court, Petitioner asserts that Raymond should not have been allowed to testify, because RESPONDENT allegedly violated Fed. R. Civ. P. 26(e), which generally requires supplementation of answers to interrogatories. Supplementation of interrogatories was not necessary in this case, however, because RESPONDENT complied with Fed. R. Civ. P. 26(e)(1) and (2) by otherwise providing the general information to which Raymond testified through direct communication with Petitioners' counsel, Huprich. Furthermore, and as noted by the Sixth Circuit, Petitioners had ample opportunity after Raymond was timely listed on the Witness List to take his deposition or request a continuance, so his deposition could be taken. Petitioners chose to take no action.

Case law cited in the Petition to support the proposition that Raymond should have been excluded from testifying relate to the exclusion of expert witnesses who allegedly *unfairly surprised* the opposing party by raising new theories of liability or damage recovery. *See e.g., Thibeault v. Square D Company*, 960 F.2d 239 (1st Cir. 1992). These cases are inapplicable, because the record showed that *the content of Raymond's trial testimony did not constitute unfair surprise.*

The testimony was generally, if not explicitly, within the knowledge of Petitioners or their counsel.

Petitioners' cited case law[3] is also distinguishable from the instant case, because Raymond testified as a fact or lay witness, not as an expert witness. In each of Petitioners' relevant cited cases, it was the lateness of the disclosure of the expert's report or opinion that gave rise to the unfair prejudice, and which resulted in the trial court's decision to exclude the testimony. However, here, Raymond testified about communications he had with Petitioners or their counsel. Raymond's testimony was generally, if not explicitly, known by Petitioners and/or their counsel. Petitioners had sufficient opportunity to depose Raymond (as the Sixth Circuit noted in its opinion), they cross-examined him at trial, and had the opportunity to present rebuttal witnesses to his testimony.

In addition, the claim of unfair prejudice carries less weight, because the jury was not considering an expert's opinion testimony based on his expert knowledge of subject matters about which jury members were unknowledgeable. *See Licciardi v. TIG Insurance Group*, 140 F.3d 357, 365 (1st Cir 1998). Rather, the jury heard testimony from Raymond regarding factual events understandable to the ordinary person. Jurors could weigh Raymond's credibility as they could weigh any other lay witness' testimony.

Finally, the instant case is distinguishable from Petitioners' cited cases, because the Petitioners in the instant

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3. *Kirstein v. Parks Corporation*, 159 F.3d 1065 (7th Cir. 1998), *cert. den.*, 119 S. Ct. 1456 (1999), *Trost v. Trek Bicycle Corporation*, 162 F.3d 1004 (8th Cir. 1998) and *Salgado v. General Motors Corporation*, 150 F.3d 735 (7th Cir. 1998).

case seek to reverse the District Court's decision to *admit additional testimonial evidence* (i.e. Raymond's testimony), whereas in the relevant cases cited, the appellants sought to reverse trial court decisions *barring additional testimonial evidence.*[4]

In *Dychalo v. Copperloy Corporation*, 78 F.R.D. 146, 148, 2 Fed. Rules Evid. Serv. 1024, 24 F.R. Serv. 2d 1383, *aff'd without op.*, 588 F.2d 819 (3rd Cir. 1980), a case not cited by Petitioners, the trial court permitted the testimony of a witness. After trial, the opposing party filed a motion to vacant the judgment, alleging that the failure to provide supplemental pretrial disclosure regarding the expert witness' testimony caused the opposing party to suffer unfair prejudice when cross-examining the witness at trial. The *Dychalo* court observed that actual notice had been given of the witness' identity, and the opposing party had the opportunity to cure any prejudicial surprise that may have existed by deposing the witness before he gave his testimony at trial. As in the instant case, the opposing party chose not to depose the witness before his cross-examination at trial. *Id.* at 146. The trial court denied the motion, noting that the exclusion of evidence is an "extreme sanction," and the burden of establishing the justification for the exclusion was on the party moving to exclude the testimony. *Id.* at 148, *citing Dudley v. South Jersey Metal, Inc.*, 555 F.2d 96, 99 (3rd Cir. 1977).

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4. Petitioners also cite *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998), *cert. den.*, 119 S. Ct. 1334 (1999). In *Klonoski* the Court of Appeals reversed a trial court's decision to admit documents that had not been disclosed at any time before they were offered and admitted as evidence. *Klonoski* is inapplicable, because there were no undisclosed documents admitted at trial in this case.

As in *Dychalo*, Petitioners knew that Raymond was a potential witness. Their counsel, Huprich, knew it more than a year in advance of trial. Huprich complained to Raymond that Raymond could not act as legal counsel and also be a witness in the case. He sent Raymond two letters about the issue and threatened a year before trial to bring the matter before the Trial Judge if Raymond did not concede his position. Raymond stood firm in his belief that under the circumstances of this case, he could properly act as RESPONDENT's legal counsel and also testify as a witness. Huprich waited until the final pretrial conference to raise the issue informally before the judge. Then, immediately prior to trial, Petitioner's Motion in *Limine* to exclude Raymond was heard, and denied. Simultaneously, however, the Trial Court disqualified Raymond as legal counsel for RESPONDENT.

Contrary to Petitioners' rhetoric, this was not a "trial by ambush." If Petitioners suffered prejudice because of the Trial Court's decision to allow Raymond to testify, it arose due to Petitioner's counsel's own dilatory tactics.[5] Petitioners had the opportunity to depose Raymond, but failed to do so. Raymond's testimony was consistent with other evidence RESPONDENT presented in the case. There was no unfair surprise.

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5. These dilatory tactics created the circumstances that enable Petitioners' to now disingenuously argue in their Petition that their lead counsel, Huprich, was in no position to rebut Raymond's testimony as a witness, because his clients had already borne the expense of having him prepare for trial and were entitled to "having their counsel of choice." Unlike RESPONDENT, who had only Mr. Raymond as its counsel until trial, Petitioners were also represented throughout the litigation by co-counsel, Matthew Schlegel. Mr. Schlegel was present during the trial, and competent to represent Petitioners.

The decision to permit Raymond to testify under the facts of this case was not a departure from the accepted and usual course of judicial proceedings, and does not require the exercise of this Court's supervisory powers. Nor should this Petition be granted on the theory that the Sixth Circuit's decision in this case is in conflict with other decisions of other United States Courts of Appeal, because the alleged conflicting cases have been distinguished as described above.

Nor should this Court grant this Petition for the purpose of defining the term "harmless" as used in Fed. R. Civ. P. 37(c)(1), or to enumerate factors to consider in determining whether a failure to disclose is "harmless" under that rule. This argument is based on the premise that Raymond was a "non-disclosed witness," (Petition, page 18) which is untrue, as evidenced above.

Furthermore, whether the admission or exclusion of evidence in any given case is "harmless" will be dependent on the unique facts and circumstances of each case. The federal rules are intended to retain flexibility, so that all the facts and circumstances of individual cases may be considered when applying the rules. Trial courts, having first-hand knowledge of the parties and the unique facts and circumstances of each case, are in the best position to establish criteria and determine whether the admission or exclusion of evidence will be "harmless." Under the facts in this case, there is no compelling reason for this Court to grant certiorari to define "harmless" under Fed. R. Civ. P. 37(c)(1).

II. THE ADMISSION OF HEARSAY EVIDENCE, IF ANY, WAS HARMLESS, BECAUSE INDEPENDENT EVIDENCE PROVED PETITIONERS' LIABILITY; FURTHERMORE, NO TIMELY OBJECTION WAS MADE REGARDING IMPROPER FOUNDATION TO EXCLUDE THE ALLEGED HEARSAY.

Petitioners objected to the admission of alleged hearsay evidence, which they claimed gave rise to reversible error. The Sixth Circuit stated, however, that none of the evidentiary rulings at issue caused any harm to the Petitioners, because there was sufficient independently admissible evidence to support the breach of contract verdict. The evidence included Petitioners' fraudulent, on-going effort to sell Ryder rental truck services from the same location as FLINT's **TWO MEN AND A TRUCK®** franchise, through a newly-formed, non-disclosed corporation, PEF, which was financially supported by FLINT. These conspiring and fraudulent acts to surreptitiously sell Ryder rental truck services from the FLINT **TWO MEN AND A TRUCK®** location, by themselves, constituted substantial evidence of Petitioners' intent to breach the franchise Contract.

Petitioners complain that the Sixth Circuit's opinion is erroneous because it said there was a finding that PEF began operating the Ryder dealership on October 5th and Petitioners insist that there was no such finding. As the Court of Appeals' opinion demonstrates, however, there was independent evidence to prove that PEF was operating on October 5th, no matter what Petitioners were willing to admit at trial. In any event, this argument amounts to a claim of erroneous factual findings, which is not a proper basis for granting this Petition,

especially where RESPONDENT prevailed before a jury of its peers pursuant to a general verdict.

Petitioners argued to the Court of Appeals that no proper foundation was laid to establish the alleged hearsay as business record exceptions. However, as RESPONDENT argued in its brief to the Court of Appeals, no such foundational objection was made at trial. If it had been, Petitioners would have objected to the admission of the entire exhibits as failing the foundational test, not merely a portion of each of them as Petitioners argued before the Court of Appeals. Having made no objection as to foundation at trial, Petitioners could not properly seek to exclude the evidence for lack of proper foundation on appeal.

In summarizing their argument for reversing the Trial Court and Court of Appeals based on the admission of hearsay, Petitioners cite no case law to support granting their Petition. Rather, Petitioners baldly speculate that if Attorney Raymond had not been allowed to testify and the alleged hearsay evidence had been excluded, then there would have been no direct evidence of Petitioners' liability, and RESPONDENT's case would have been based on "extremely weak circumstantial evidence." Such speculation fails, by any standard, to constitute the character of the reasons necessary for granting a petition for writ of certiorari.

III. ADMISSION OF THE PRELIMINARY INJUNCTION WAS REASONABLE BECAUSE IT WAS RELEVANT AND DID NOT GIVE RISE TO UNFAIR PREJUDICE OUTWEIGHING THE PROBATIVE VALUE OF THE EVIDENCE; IN ANY EVENT, PETITIONERS SUFFERED NO HARM BECAUSE THERE WAS SUBSTANTIAL INDEPENDENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Petitioners' Motion in *Limine* filed immediately before trial sought to exclude any evidence of a Preliminary Injunction Order previously entered in the case. The Order enjoined Petitioners from using RESPONDENT's service marks and franchise operating system. Petitioners' Motion in *Limine* asserted that evidence of the existence of the Order was not relevant under F.R.E. 402 and caused unfair prejudice, which outweighed the probative value of the evidence under F.R.E. 403.

RESPONDENT noted in its brief in opposition to the Motion that the injunctive Order was highly relevant because:

a) Petitioners claimed millions of dollars of lost present and future profits in their counterclaim, premised on the theory that the preliminary injunction caused them to lose their business telephone numbers;

b) Evidence of the existence of the preliminary injunction illustrated that Petitioners refused to voluntarily stop using the **TWO MEN AND A TRUCK®** service mark, which Petitioners had claimed was worthless throughout their pretrial pleadings; and

c) Without an express understanding that Petitioners did not voluntarily stop using the trademark and franchise operating system, the jury would likely be confused; it would unfairly and inexplicably be required to guess what occurred in April 1995 to cause Petitioners to stop using RESPONDENT's service mark and business telephone numbers; it could have erroneously guessed that Petitioners voluntarily stopped using them.

The Trial Court denied Petitioners' motion, but noted that a cautionary instruction could be given. Petitioners' counsel stated he would propose such an instruction. However, when the parties and Trial Court met after completion of the proofs to discuss the proposed jury instructions, Petitioners' counsel failed to propose any cautionary instruction, even though both parties had prepared proposed jury instructions for the Trial Court to consider. Nor did Petitioners object that no cautionary instruction was to be given, despite numerous other objections made by Petitioners to the proposed instructions.

Evidence of the entry of the preliminary injunction was central to Petitioners' counterclaim for breach of contract, because Petitioners claimed that imposition of the injunction breached the contract and caused Petitioners to suffer millions of dollars of present and future lost profits. Furthermore, if the jury did not know that Petitioners refused to voluntarily forego the use of RESPONDENT's mark and business phone numbers, then the jury might have logically, but erroneously, assumed that Petitioners voluntarily stopped using the mark when RESPONDENT (per Petitioners' theory) allegedly wrongfully terminated FLINT as a

franchisee. The jury would have been left in a fog, lacking a crucial fact as to the intentions and possible motives of the parties. Thus, the prejudice, if any, suffered by the Petitioners in admitting evidence of the preliminary injunction did not outweigh the probative value of the evidence to establish a clear understanding of the facts.

The Sixth Circuit held that there was sufficient independently admissible evidence to support RESPONDENT's breach of contract claim. It said that the admission of evidence of the preliminary injunction "could not have significantly strengthened a case that was already strong."

Petitioners conclude in their brief before this Court, without citing any law to support their position, that the Sixth Circuit's ruling is erroneous and that there was unfair prejudice created by admitting evidence of the preliminary injunction. Petitioners make no attempt to weigh the alleged unfair prejudice against the probative value of the evidence as required by F.R.E. 403. They simply conclude they were unfairly prejudiced, using as proof the Court of Appeal's statement in its opinion that the Petitioners admitted that PEF began operating the Ryder dealership on October 5th, when Petitioners say it did not. As noted above, evidence of the preliminary injunction was a crucially important fact in Petitioners' proof of its counterclaim and for the jury's full understanding of the parties' intent and motives.

In short, Petitioners have provided no compelling reason for this Court to grant their Petition for a Writ of Certiorari based upon the Trial Court's decision to admit evidence of the preliminary injunction. Substantial evidence independent of the preliminary injunction supported the jury's general verdict in RESPONDENT's favor.

IV. THE TRIAL COURT COULD NOT MAKE FINDINGS OF FACT WHERE THERE WAS SUBSTANTIAL EVIDENCE PRESENTED TO THE JURY FOR IT TO DECIDE ISSUES OF FACT.

Petitioners contend that the Trial Court erred by failing to make certain findings during Petitioners' Rule 50 motion that would have allegedly resulted in the dismissal of RESPONDENT's breach of contract claim before it was submitted to the jury. The Trial Court refused to make such findings, properly leaving the evidence for the jury's consideration. The Court of Appeals affirmed.

In their Petition to this Court, Petitioners say that the Trial Court should have made at least two findings of fact, namely: (1) FLINT did not violate Article III(4) of the Contract and, (2) FLINT did not violate Article III(7) of the Contract. The general jury verdict rendered in this case found FERNSLER and FLINT liable for breach of contract, without stating the specific sections of the Contract they violated.

A. The evidence admitted supports RESPONDENT's claim that FLINT's operation of a Ryder rental truck business violated Article III(4) of the Contract.

Article III(4) of the Contract states in relevant part:

> **Manner of Using Marks.** It is specifically understood and agreed that the Franchisee shall use Franchisor's trade names, marks and logos licensed by this Agreement only in such ways as are permitted by the Franchisor in its operations manual or other written notice . . . [T]he

> Franchisee shall not use its name or any other name not previously approved in writing by the Franchisor in connection with any of Franchisor's marks, trade names or logos.

The following evidence presented at trial proved that Petitioners violated Article III(4):

a. FERNSLER'S admission that FLINT was operating a Ryder rental truck business from its **TWO MEN AND A TRUCK®** franchise location;

b. FERNSLER'S signing of a Ryder Dealer Agreement on February 4, 1994 as "Two Men and a Truck";

c. FERNSLER'S and FLINT's apparent authorization of a newspaper article published on May 12, 1994 stating that "Two Men & A Truck is a new Ryder Truck Rental dealership . . . ";

d. A statement in the local newspaper attributed to FERNSLER, and never denied by her, that she said: "Two Men & A Truck will rent Ryder trucks locally by the day, week or month . . . ";

e. RESPONDENT's May 25, 1994 letter to FERNSLER informing her that FLINT was violating the Contract, Article II(3), III(4) and III(7) by operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location;

f. RESPONDENT's President's uncontradicted testimony that FERNSLER admitted that she should have gotten written authorization before operating a Ryder rental truck business from FLINT's franchise location;

g. FERNSLER's admission that incorporating Ryder rental services in FLINT's **TWO MEN AND A TRUCK®** franchise operation was a "new idea" for the **TWO MEN AND A TRUCK®** franchise system;

h. FERNSLER's incredible testimony that she didn't think it "relevant" or "worth sharing" with RESPONDENT that she had incorporated PEF and that PEF was incorporated for the purpose of operating a Ryder rental truck business from FLINT's **TWO MEN AND A TRUCK®** location, after FERNSLER had already agreed to sign a test-market agreement to test the Ryder rental truck business within the **TWO MEN AND A TRUCK®** system. The jury could have inferred from this secretive and fraudulent behavior that FERNSLER understood she had violated Article III(4), but concocted a plan to try and avoid liability.

This evidence and all legitimate inferences that can be drawn from it, considered in a light most favorable to RESPONDENT, established a *prima facie* case that Petitioners used the RESPONDENT's service marks in conjunction with the Ryder name so as to violate Article III(4) of the Contract. Jurors could have (and did) reasonably

reach a conclusion different than that argued by Petitioners in this case.

B. The evidence admitted supports RESPONDENT's claim that FLINT's operation of a Ryder rental truck business violated Article III(7) of the Contract.

Article III(7) states:

> **Permitted Business Name.** No part of the Franchisor's proprietary marks and trade names nor any words similar thereto shall, without the prior written approval of the Franchisor, be included in any trade name utilized by the Franchisee or by any corporation, partnership or other entity in which the Franchisee may, at any time, have any direct or indirect interest, provided that where required or permitted by applicable law, the Franchisee may register himself as carrying on business using the name indicated in Section C of Exhibit 1 as an assumed or fictitious name.

Based on the evidence admitted and cited in the previous section, Petitioners did not receive written approval to use RESPONDENT's **TWO MEN AND A TRUCK®** mark with the trade name "Ryder", and on its face, such commingling of the two names was a violation of Article III(7). Furthermore, by incorporating PEF and purportedly transferring the Ryder rental truck business to that entity, Petitioners were using an entity in which FERNSLER had a direct interest and FLINT had an indirect interest to enable Petitioners to mix the Ryder name with the **TWO MEN AND A TRUCK®** mark. The commingling of the two names violated Article III(7).

The evidence admitted, and all legitimate inferences that could be drawn from that evidence, when considered in a light most favorable to the non-movant RESPONDENT, established a *prima facie* case that Petitioners violated Article III(7) of the Contract.

Substantial evidence, including the evidence cited above, was presented to the jury for its consideration. The jury found that a preponderance of the evidence supported RESPONDENT's breach of contract claim. The Court of Appeals properly affirmed.

In their Petition before this Court, Petitioners cite *Rowland v. Mad River Local School District*, 730 F.2d 444, 450 (6th Cir. 1984), where the Court of Appeals reversed the trial court for committing "plain error" in an equal protection case, because there was no proof that the plaintiff had been treated any differently than similarly situated employees employed by the defendant school district. Without such proof, the *Rowland* plaintiff had no *prima facie* case to present to the jury. The holding in *Rowland* is inapplicable in this case, however, because there was substantial evidence presented to the jury (including Petitioners' own admissions) to prove Petitioners' violations of the franchise Contract.

Petitioners have generally chosen to ignore the substantial proofs submitted to the jury proving breach of contract. Instead, they have selectively considered portions of the evidence to argue that there was no proof of contract violations to present to the jury (pages 26-28).[6] Significantly,

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6. Petitioners state that the failure to make required findings violated Petitioner's federal "due process" constitutional rights. (Petition, page 26) This argument was not made to the Court of (Cont'd)

despite these arguments, they are compelled to admit in their Petition (page 23) that there is at least "circumstantial evidence" to prove that FLINT breached its Contract by selling Ryder services. In light of this admission, Petitioners assertion that there was no proof of Contract violations is disingenuous and incredible.

V. RESPONDENT PROVED PEF's LIABILITY AND OBLIGATION TO PAY DAMAGES FOR USE OF RESPONDENT'S SERVICE MARK.

The evidence presented at trial proved that RESPONDENT suffered damages due to Petitioner PEF's misappropriation of RESPONDENT's service mark. RESPONDENT's President presented evidence with respect to these damages. The jury awarded RESPONDENT $15,000 against all Petitioners, including PEF, as a joint tortfeasor. 3 McCarthy on Trademarks Sec. 25.23 (12/96 ed.); *see Hard Rock Café Licensing Corp. v. Concession Services*, 955 F.2d 1143, 1150, 21 U.S.P.Q. 2d 1764, 1768 (7th Cir. 1992). The

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(Cont'd)
Appeals, so even if it had validity, it has been waived. In addition, Petitioners cited no law to support the proposition. Unconcerned about these details, Petitioners then leap to the conclusion that the lower courts' failure to make findings (the alleged constitutional error), requires this Court to grant certiorari, unless the so-called constitutional error "was harmless beyond a reasonable doubt." The Due Process Clause does not guarantee citizens perfect judiciary proceedings, as Petitioners' argument implies. Therefore, the alleged failure to make findings in this civil action, does not constitute a violation of the Due Process Clause. Furthermore, using a criminal law standard (proof beyond a reasonable doubt) in a civil case that requires proof by a preponderance of the evidence is illogical and stands the law on its head.

unfair competition damages were doubled as authorized by 15 U.S.C. § 1117(a), because, among other reasons, the Petitioners' misrepresentations and obfuscation about their financial status, made proof of actual damages virtually impossible to calculate. The Court of Appeals affirmed the award, noting that the record reflected that "defendant [Petitioners] impeded the calculation of damages." Where redress requires an under-compensated plaintiff to additional damages and the damage calculations are imprecise and the imprecision results from defendant's conduct, it is appropriate to enhance the damages. *Taco Cabana Int. v. Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991), *cert. granted in part*, 502 U.S. 1071, 112 S. Ct. 964, 117 L. Ed. 2d 130 (1992), *aff'd*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992).

CONCLUSION

No ruling made by the Court of Appeals in this action is in conflict with any other Court of Appeals decision on an important matter. Nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the Trial Court, to require this Court's exercise of its supervisory powers. In short, Petitioners have presented no compelling reason for granting their Petition, and the Petition must be denied.

Respectfully submitted,

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